No. 15172

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

W. B. JONES LUMBER COMPANY, INC., and LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2288, AFL,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT UNION.

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BRIEF FOR RESPONDENT UNION.

This case is before the court on petition of the National Labor Relations Board to enforce an order issued by it, dated October 14, 1955. The court's jurisdiction is invoked under the provisions of Section 10(e) of the National Labor Relations Act, as amended (29 U. S. C., Secs. 151 *et seq.*).

Statement of the Case.

Upon a complaint erroneously issued, a hearing was held before a Trial Examiner upon allegations that the W. B. Jones Lumber Company, Inc., had discharged one Donald Tooze in violation of Section 8(a)(3) of the National Labor Relations Act and that Lumber and Sawmill Workers' Union, Local 2288, AFL, had caused this discharge in violation of Section 8(b)(2) of that Act. Both respondents filed answers denying the commission of the unfair labor practices and the assertable jurisdiction of the Board over the controversy. At the hearing, many erroneous rulings were made, evidence was improperly admitted and credited and the Trial Examiner through misconduct denied respondent union the requisites of a fair hearing and due process of law, all of which will be discussed in more detail hereafter. Respondent union filed exceptions to these various errors and misconduct. The Board however adopted the rulings and recommendations of the Trial Examiner in all material respects. Motions by respondent union for dismissal based upon failure to prove by substantial evidence that the Board had jurisdiction and that respondent union had committed the unfair labor practices were made before the Trial Examiner and were overruled and denied in his Intermediate Report.

Summary of Argument.

It is the position of respondent union, to be developed hereafter that the petition of the National Labor Relations Board for enforcement of its purported Order dated October 14, 1955 should be denied for the following reasons: (a) The findings, Conclusions and Order of the Board are supported by substantial evidence on the record considered as a whole and (b) that the Board has not afforded respondent union the requisite due process of law.

Questions Presented.

The basic questions here presented by respondent union are:

1. Whether the Board's Findings of Fact and Conclusions of Law that it had assertable jurisdiction over this controversy are supported by substantial evidence.

2. Whether the Board afforded respondent union the requisites of a fair hearing and due process of law.

3. Whether the Board's Findings of Fact and Conclusions of Law that respondent violated Section 8(b)(2) of the Act are supported by substantial evidence.

4. Whether the Board's Order as to respondent union is too broad and hence unenforceable.

ARGUMENT.

I.

The National Labor Relations Board Did Not Have Assertable Jurisdiction of the Controversy.

At the hearing, the Board, through its General Counsel sought to sustain its exercise of jurisdiction over the present matter by attempting to show that the W. B. Jones Lumber Company (a respondent below) sold its wares in a sum in excess of $200,000 per annum to customers who in turn had each sold and shipped in interstate commerce products valued in excess of $50,000 for each customer. The proof was confined to the year of 1954. (See *Jonesboro Grain Drying Company,* 110 NLRB No. 67.) The Trial Examiner and the Board found that its jurisdiction should be asserted on this ground alone, discarding other considerations and factors.[1]

The question thus presented for decision is whether the Board has sustained its burden of proving by substantial evidence that the case comes within this limitation, which it has placed upon the exercise of its own jurisdiction.

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[1]The Board in its brief before this court says that the evidence establishes that Jones shipped over $30,000 worth of materials from California to Nevada and that this without more would establish that Jones operations are subject to the National Labor Relations Act. (Br. p. 6.) However, neither the Trial Examiner nor the Board decided to assert jurisdiction on this basis. The Trial Examiner expressly refrained from doing so saying that his decision to follow the $200,000 theory was sufficient to satisfy criteria for the assertion of jurisdiction as described in the *Jonesboro* case. [R. 16, footnote 3.] No exception was filed to this ruling which was adopted by the Board without comment. [R. 68.] (See also 29 U. S. C. A., Sec. 160(c), findings not excepted to are binding on the Board.) We are not here concerned with what the Board might have done but what it did. The court is asked to enforce the order as made and not otherwise.

The "evidence" upon which the case was tried consisted of the testimony of some 25 witnesses who were employees of 25 different concerns located in Los Angeles and Orange Counties of the State of California. These concerns were said to be customers of the Jones Company to which, in the aggregate, Jones sold materials valued in excess of $200,000, in 1954. To succeed in sustaining the theory of the exercise of jurisdiction in this case, each of these concerns would have to be shown as their, individually, having, in turn, sold or shipped goods in commerce in excess of $50,000, each.

Of these 25 concerns the Trial Examiner, in his Intermediate Report (adopted by the Board), eliminated all but 15,[2] apparently on the grounds that the "evidence" offered

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[2]The tabulation of the Trial Examiner [R. 16-17] is set forth here as a convenient aid to the court, including the amounts purchased from Jones.

Sprague Engineering Corporation	$ 9,069.13
Johnston Pump Company	8,197.70
Stauffer Chemical Company	10,220.85
Wolf Range & Manufacturing Company	6,803.33
Mission Appliance Company	14,415.13
Hammond Manufacturing Company	18,662.20
Mississippi Glass Company	30,028.40
Southern Heater Corporation	8,274.67
C & M Manufacturing Company	26,734.94
Ducommun Metals & Supply Company	19,705.88
National Supply Company	20,801.55
Columbia Pictures Corporation	11,531.97
Chrysler Corporation	8,010.35
Phelps Dodge Copper Products Corporation	4,192.64
Morris D. Kirk & Sons, Inc.	14,263.83
Total	$210,912.57

At the hearing it was stipulated that as to Stauffer Chemical Company, National Supply Company, Columbia Pictures, Chrysler Corporation, Phelps Dodge Copper Products Corporation and Mission Appliance Corporation, each had, during the period in question, shipped in excess of $50,000 in interstate commerce. The total purchases, from Jones, by these latter concerns is $69,172.29.

by the Board's General Counsel was so insubstantial that a finding based thereon would not stand.

Respondent here contends, as it did before the Trial Examiner and the Board, that the burden of proving assertable jurisdiction was upon the Board's General Counsel and he failed to sustain that burden by the introduction of substantial evidence that the customers of Jones had each sold in interstate commerce goods valued in excess of $50,000, in 1954.

This court, in *N. L. R. B. v. Haddock Engineers, Ltd.,* 215 F. 2d 734,[3] reiterated the well established rule that the burden of proof to establish jurisdiction was upon the Board, where as here the question of the Board's jurisdiction is put in issue by the pleadings. [R. 15, 92; Bd. Exs. 1-E and 1-H not printed.]

In order to consider whether the Board has sustained its burden of proving its jurisdiction by substantial evidence, it becomes necessary to set forth in some detail, the testimony given by employees of the concerns considered by the Trial Examiner and Board together with certain objections and rulings.

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[3]The Trial Examiner held that *NLRB v. Haddock Engineers Ltd., supra,* was inapposite because the evidentiary point at issue was whether a written admission, bearing on commerce facts, made by the company respondent was binding on the union. The Trial Examiner, however, did not try to disapprove the court's holding that the burden of proof was upon the Board's General Counsel. The Trial Examiner also argues that since the phrase "in so far as practicable" was not mentioned in that case the court had no occasion to apply or construe it. In this, we believe the Trial Examiner did not read into the case the obvious holding that encompassed in the burden of proof was the obligation of showing lack of practicability. [R. 16.] In any event the Trial Examiner did not reverse the court's holding that the burden of proving jurisdiction was upon the Board and that this obligation could only be fulfilled by substantial evidence on the point. We suggest that the *Haddock* case has further meaning which we will hereafter show.

A.

Sprague Engineering Corporation.

William Merrill, testified that he was the Secretary-Treasurer of this company and that he had prepared a summary of his company's *purchases* from Jones Lumber Company from the books and records of the company; that the books were under his control and that the amount of purchases was $5,600 Merrill was then asked if he had any knowledge of the sales of the company to which he replied "For the fiscal year ending September 30, 1954, they were approximately $5,600,000.00." Respondent objected and moved to strike this on the grounds that the answer was not responsive and not the best evidence. The objections was overruled and the motion denied. [R. 103-104.] Merrill was then asked to tell what proportion of those sales were shipped in interstate commerce. Respondent objected on the grounds of no proper foundation, hearsay and not the best evidence and as calling for a legal conclusion of the witness. Trial Examiner ruled that the question called for his knowledge and overruled the objection. Merrill then stated that at least 70% of "it is interstate." On cross-examination Merrill stated that the 70% that went into interstate commerce was not represented by a figure present in the courtroom but that the figure of $5,600,000 was a published figure of annual sales. He gave no testimony as to the sources of this annual sales figure, nor did he have any records present in court to sustain his guess as to the correctness of the published figure. [R. 105.] Merrill was asked if he could give examples of some of the persons to whom shipments were made and the amounts. He said he could if he were prepared but that he did not have this information in his head. He further

stated that he had no idea as to the amounts. [R. 105-106.] Upon being prodded by the Trial Examiner, Merrill mentioned some companies to which shipments had been made and their states of location but he was unable to state how much of the "70%" each of them received [R. 106-108], at least not from records he had with him. [R. 108.] Respondent then moved to strike his testimony with respect to that portion having to do with "interstate" commerce on the grounds of no proper foundation, hearsay, and not the best evidence. The motion was denied. [R. 108.]

The General Counsel then offered Exhibit 3 (not printed) and objections as to not the best evidence, conclusions, no proper foundation, incompetent, irrelevant and immaterial were made and overruled. Merrill stated the company records were in Gardena, California, about 13 miles from the hearing, except as to some data he had with respect to purchases, which he declined to leave at the hearing for inspection of respondent. [R. 109.]

B.

Johnston Pump Company.

George C. Fee, was called by the General Counsel and testified that he was the administrative assistant to the General Manager of the Johnston Pump Company, which is located in Pasadena, California; that his duties were many and varied but that he reviewed daily invoices and most of the price literature. [R. 165-166.] He said that Johnston shipped out of California and that each shipment is covered by an invoice and that he had brought some of the invoices with him, explaining that they were invoices to special buyers, not a customer but a distributor. He said that he had recently gone over these invoices

(contained in five binders which he had with him) and that from the course of his review he was able to testify concerning shipments outside of California; that the invoices were in the custody of the accounting department and that some of the invoices had previously come to his attention, that he had obtained the invoices from the accounting department which makes them out and keeps them in a file [R. 168], and that the invoices were the original entries of the accounting department, most of which had been posted to the books. [R. 169-170.] When asked to leave the invoices and binders for inspection of respondent. The witness declined. [R. 171.] He was then, over objection, asked to tell the approximate value "of the shipments" [R. 171], and stated he had not totaled up the figures for any of the invoices in these binders and then was asked if the invoices reflect shipments in a value in excess of $50,000 and he answered "yes." He did not however, testify that the total in excess of $50,000 reflected shipments in interstate commerce. [R. 175-176.] The binders containing the invoices were marked as exhibits but were not offered in evidence. [R. 175.]

C.

Wolf Range Manufacturing Company.

The General Counsel called, as a witness, Robert H. Lancaster, who testified that he was office manager for Wolf Range Manufacturing Company, located at 5731 South Alameda (Huntington Park, California), that his main duty was credits of dealers and also had charge of accounts payable, that there was a Mr. Danielson who handled the ledgers, accounts receivable and general ledger and that two girls received orders and made billings

[R. 177], that none of these were completely under his supervision. He testified that the company maintained a sales journal, that the primary record comes from invoice files that are recorded in the journal and from there posted to various accounts. He said that he did not prepare the invoices but that he checked the price. The invoices were posted to the journal by Danielson who had done this type of work for nearly the past two years. [R. 178-179.] Lancaster testified that he had not made a summary from the accounts showing sales to dealers in states other than California but that he had brought the tax reports to the state of California. He said he could have brought the sales journal but thought the tax report might suffice. The sales journal, he said, was a book about three inches thick and about 15 to 18 inches long [R. 179-180], and contains approximately about 150 pages and that the book was not in current use. [R. 180.] He further stated that he had an adding machine tape which showed the total of sales to customers out of the state. He stated that Danielson made up the tax reports which he had brought and that the report was made from the invoice file [R. 181-182] and that the tax reports are made up quarterly. He testified that the tax report file which he had with him was kept to assist the auditors of the State Board of Equalization who make an audit about every two or three years. From these reports he says there is a figure which indicates shipments out of state in the sum of $55,729.61 for a three month period. However, he did not testify that the figure was correct or that he had confirmed the correctness of the figure. [R. 187.] Lancaster further stated that the books of invoices were not present in the hearing room and the 1954 figure was covered by the sales journal and that to support the journal he should

have the copies of the invoices which were in the company's office. He further stated that the sales journal did not show what was shipped and that resort to the invoices would have to be made to confirm that figure. Finally he stated that the tax report was made from the sales journal. [R. 188-189.]

D.

Hammond Manufacturing Company.

Roy Frederickson, chief accountant for Hammond Manufacturing Company, called as a witness by the General Counsel testified that his duties were to prepare financial statements and supervise the office as far as accounting is concerned and that the company records of sales are in a sales journal and individual invoices, that the sales journal is kept by a Mrs. Rau [R. 191] and that he supervises her work. These records in summary are posted to the general ledger and sales tax return. In answer to a question, "Have you prepared a summary of the sales during the year 1954 for your company" and he replied "I have prepared financial statements from those sales and I do have the sales tax returns." He testified that he prepared the tax returns from the sales journal and that the tax returns show where the merchandise is shipped. Frederickson handed General Counsel a sales tax return for "the fourth quarter" 1954 which was marked for identification as General Counsel's Exhibit 32. The tax return is sent to the state. From this tax return he was allowed to say that the value of goods shipped out of state was $444,325.45 Mr. Frederickson did not present any financial statement nor did he have any records other that the tax return at the hearing. [R. 192-193.]

E.

Mississippi Glass Company.

The evidence given as to this company's business was through Richard Smith, office manager for the Company, which is located in Fullerton, California. His duties consisted of "supervision and carrying out of order for my superior and also keeping records and data." [R. 194.] He stated that the company kept records of all shipments by invoices which are prepared by a billing clerk under his direction. These invoices occupy a full drawer space in the filing cabinet and the files are in daily use. He testified that he had prepared a summary from these files, which was marked General Counsel's Exhibit 33 for identification. [R. 195-196.] He said that at the end of every month a similar summary is made and General Counsel's Exhibit 33 was taken from those summaries. [R. 196.] He said it would be possible for respondent to check the invoices and stated the total sum of the invoices was $32,415.68[4] which stood for shipments out of state. General Counsel's Exhibit was offered in evidence and objection was made on the ground that it was not the best evidence and was incompetent, irrelevant and immaterial. The Trial Examiner excluded the exhibit, stating Smith's "evidence is in as to the amount." On cross-examination Smith said the company kept an invoice file which was at the office in Fullerton. He stated he was asked to bring a summary of the invoices but had not brought the invoices as they were too heavy. He said

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[4]This figure erroneously appears as $324,015.68 in the printed records whereas the stenographic transcript appears as noted above. The Trial Examiner ordered the figure changed from $32,415.68 to $324,015.68 to accord with the notes taken by him at the hearing. We shall deal further with this phase in our discussion of denial of due process, *infra*.

the summary he brought was not a record kept in the ordinary course of business, that there was a summary in the office files but that he had not brought that summary as he did not want to disturb the office files, that this summary is a report. [R. 198-199.] Smith further stated that the invoices were posted to a certain book and there would be no objection to respondent having reference to that book at the company's plant. (Pet. Br. p. 19.) Smith did not testify that the summary was correct.

F.

Southern Heater Company.

Capitola Fierke, a bookkeeper for Southern Heater Company testified that she keeps record of accounts receivable, accounts payable and the general ledger, that records of shipments—bills of lading and invoices—are kept. Another person prepares the invoices, which when made up are filed until shipment is made and then a bill of lading goes to the shipping clerk and customer is billed. She said she had not brought the invoices as they were bulky and because the 1954 invoices were used all the time. According to her there would be no objection if respondent inspected the invoices at the plant which was in Compton, California. [R. 201-205.] She presented a summary which she did not prepare and on which "she made a little check but not much." As a result of this summary she calculates the sales out of California to be $1,799,815.00, and presented an adding machine tape. She stated she could not tell what the tape actually represented without checking with other figures and that the only way she could determine how much material was shipped would be to go back to the invoices and review them. [R. 206-207.]

G.

C & M Manufacturing Company.

Harry McCully, president of C & M Manufacturing Company says his company ships out of state and that he obtained his knowledge from receiving orders and shipping completed units—that the company sells in the eleven western states and that 50% of the business is out of state. He testified that the company did approximately $1,300,000 business in 1954. [R. 208-209.] He said that he was not asked to bring the invoices and that he had not done so, that the invoices were on file in the plant. When asked if "there is likely to be available in your office actual figures showing your sales outside of the state of California . . ." he answered, "I don't know—personally I don't know." He then said the figures were in the possession of the bookkeeper at the company's plant. [R. 209-210.]

H.

Morris D. Kirk & Sons.

Robert Morse a witness for the General Counsel testified that he was the treasurer of this company and that his duties were financial accounting. He keeps sundry cost, statistical and financial records. The billing department of the company makes up the invoices of sales which are the original records. He stated the company ships out of state to all eleven western states. He presented some invoices which were marked for identification as General Counsel's Exhibit 35 and stated these were invoices he selected to show out of state shipments to the extent that I needed $50,000 and that his secretary had totaled them to the sum of $52,719.72, but that he had not checked the figure on the tape. He did not testify that the figures were correct. [R. 212-214.]

I.

The Trial Examiner's Statement.

At the end of the hearing the Trial Examiner made the following statements:

> "I have taken the position, if it isn't clear that in connection with these witnesses who have testified as to figures, if it is brought to my attention that the respondent union has any difficulty in verifying any of the information from the records, I would entertain a motion to strike all of the testitmony that has been given in connection with the figures. [R. 215.] . . . I have taken the position that it would be impracticable to load up this proceeding with all of the records that have been referred to throughout and I have been reasonably satisfied that with these neutral parties, the records will be available to any of the parties for any check they wish to make. [R. 215.] I suppose when it comes down to . . . the question of dollars and cents whether you have or not established within the Board's criteria the dollar value of out of state shipments by various concerns proceeding on the assumption you have established that the respondent company has made $200,000 worth of sales to concerns; they have in turn, sold goods or services totalling at least $50,000 each, outside of the state of California." [R. 216.]

J.

The Unsubstantiality of the Evidence and the Denial of Due Process.

From the foregoing testimony a clear pattern emerges, showing that persons, strangers to the controversy and having no interest in the result, were permitted to give opinions, conclusions and observations with respect to their respective companies' engagement in interstate com-

merce. In most cases they neither supported their conclusions with records of their companies nor did a single one of these witnesses testify under oath that the figures they gave were correct.

A sharp example is revealed in the testimony of Harry McCully, president of C & M Manufacturing Company where he was permitted to say that his company in 1954 did approximately $1,300,000 worth of business and that 50% of that amount was outside. When asked whether there was likely to be actual figures showing the sales outside of California for the year 1954, he answered "I don't know". When urged by the Trial Examiner to answer the question "yes" or "no", Mr. McCully again answered, "personally, I don't know". From this testimony the obvious hearsay aspects become clear. It is a matter of common knowledge that where a president of a corporation does not keep the books he relies upon what he is told by some other person as to the figures concerning the company's business.[5] He frankly stated that he did not know if there were actual figures in the company's files which would should the amount of out of state business. Nor were any records, or summary of records offered to substantiate his statement. He admitted that he did not make all of the sales himself; that the sales manager and others made sales as well as himself. No offer was made of any records for the inspection of respondent or its use of such records, if there were any, in cross-examination. That McCully's testimony was obviously hearsay cannot be refuted because by his admission, he did not keep the records, the correctness of which depended upon the competency of Mrs. Garrett, who though apparently available

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[5]McCully testified that the bookkeeping of the company was in charge of Katherine Garrett. [R. 210.]

was not called as a witness and hence the substance of McCully's statements could not be cross-examined to reach the activities of Mrs. Garrett. Under the well established rule, evidence is hearsay and inadmissible when the probative force of evidence depends in whole or in part on the competency and credibility of some person other than the witness by whom it is sought to produce it. 31 C. J. S. 919, and statements otherwise hearsay do not become competent because they have been reduced to writing or sworn to by the witness. (31 C. J. S. 930, 933, 936.) Under this rule the statements of McCully were not admissible and not probative. There was no evidence given in corroboration of McCully's statement. The result being that so far as the purchases by C & M Manufacturing Company could not be counted in arriving at the necessary figure of $200,000. In this instance the purchases were said to be the sum of $26,734.94, which when deducted from the amounts of purchases found by the Trial Examiner and adopted by the Board reduces the sales to Jones customers to $184,177.63 and thus the requisite sum of $200,000 is not reached and under the Board's limitation the exercise of its jurisdiction should not have been asserted.[6]

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[6]It is to be noted that while Jones through the General Counsel introduced hearsay as to the amount of its sales to C & M Manufacturing Company, McCully did not corroborate such sale. Thus even the statement of the sales to C & M amount to no more than uncorroborated hearsay and does not amount to substantial proof of this item. (*Edison v. N. L. R. B.*, 305 U. S. 197, 229-230; *N. L. R. B. v. Haddock Engineers, Ltd.*, 215 F. 2d 734; *N. L. R. B. v. Meat Cutters Local*, 202 F. 2d 671.) Likewise, with the exception of Sprague Engineering Company, none of the purported customers, through their employees called as witnesses by the General Counsel gave any corroborating testimony with respect to the amounts, if any, of their respective companies' purchases from Jones during 1954 and thus the evidence in the records as to sales by Jones to the customers amounts to uncorroborated hearsay which is not sufficient to prove that Jones sales exceeded the $200,000 requisite.

Similarly, the witness called by the General Counsel of the Board gave opinions and conclusions, some of which were purported summaries of original records in the respective records of the companies by which they were employed. Some of them brought data which they claimed were the basis of their conclusions, but in only two instances was respondent permitted access to those records for the purpose of inspection and cross-examination.

Two witnesses, Capitola Fierke and George Fee, admitting they have certain supporting records present in the hearing, refused to permit the record to be inspected or used for cross-examination and they were permitted by the Trial Examiner to take those records back to their respective plants. [R. 202-205; 170-171.]

Summaries were submitted by Capitola, Lancaster, Frederickson and Morse, all witnesses for the General Counsel. Each admitted that the records of the company had not been brought into the hearing and in the case of Lancaster he did not prepare a summary of the sales from the company records but merely brought a copy of what he said was a tax report. Lancaster said he could have brought the sales journal[7] but had not done so. Morse presented a summary prepared by his secretary which he had not checked. [R. 214.] Frederickson stated that his company (Hammond Manufacturing Company) had a sales journal kept by a Mrs. Rau, which contained a summary of the sales invoices. That he had brought neither

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[7]Lancaster testified that he had not kept the sales journal for over two years and that the journal was being kept by a Mr. Danielson, who it appears could have been present along with the sales journal. [R. 178-180.] No corroboration of his testimony was attempted.

of these records but had brought a tax report,[8] which he said was prepared entirely from the sales journal. From this tax report he was permitted to give a figure of his company's engagement in interstate commerce. The tax return was not introduced in evidence. Merrill was permitted, over objection to testify that 70% of his company's business was interstate and admitted that he had no figure at the hearing to substantiate his statement. He said that the figure he had obtained from a published annual sales figure but he did not testify as to how or from what this financial statement was made nor did he produce it. [R. 105-106.] He was unable to state that any portion of the 70% was shipped to customers which he named. [R. 106-109; Bd. Br. pp. 15-16.]

From the foregoing we believe that enough has been shown to strongly indicate the unsubstantial character of the evidence on which the Board bottomed its finding of jurisdiction. That this evidence was inadmissible is supported by a long unbroken line of cases decided by this court beginning with the decision of Judge Rudkin in 1933 and in 1935 reaffirmed by Judge Denman in *Greenbaum v. United States,* 80 F. 2d 113, 120. There, Judge Denman pointed out that this court had followed a rule that where books of account are offered as evidence against one not a party chargeable with an interest in their keeping, that in order to lay a foundation for the admission of such evidence it must be shown that the books were either the original entries or the first permanent entries of the transactions. Judge Denman commenting upon the testimony of accountants summarized from examination of

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[8]Tax reports do not constitute proof of their contents. (*Zwack v. Kraus,* 133 Fed. Supp. 929, 936: *United States v. Int'l Harvester* Co., 274 U. S. 693, 703.)

such books and records pointed out that the human factor, in such procedure, required that such evidence should not be permitted as to books not available for the purpose of cross-examination and that such conclusions, in the absence of the books, for the purpose indicated, were inadmissible as evidence. Judge Denman pointed up the absence of testimony that all of the pertinent original entries were in the material offered in evidence. There as here the invoice files preceded journalization and were necessary in determining the validity of the summaries, the absence of which made the summary hearsay and inadmissible.

Again, in *Willipoint Oysters Co. v. Ewing,* 174 F. 2d 691, this court, in this regard, said:

> "As we held in *Agustin v. Bowles*, 149 F. 2d 93, 96, the rule is that 'where voluminous documents are necessary part of the evidence in a cause, it is well settled that tabulations of these documents in the form of charts, and schedules may be introduced for the aid of the trier of fact. Most courts require that the mass thus summarily testified to, be placed on hand in court so that the opposing party may inspect them and use the material for cross-examination. To that rule we adhere."

Again in a later case, *Gross v. United States,* 201 F. 2d 780, 787 this court reiterated the above view and said:

> "This court and many other circuit courts of appeal have frequently approved charts, calculations, tabulations and summaries in both civil and criminal cases where such documents were prepared from original records which were *available for inspection and use in cross examination.*"

We submit that under the weight of these uniform authorities the Board has not borne the burden of proving by substantial evidence that the instant controversy comes within the jurisdictional acceptation of the Board. The testimony offered by the General Counsel, under these citations was clearly hearsay, uncorroborated. As hearsay it was under the ordinary rules of evidence not admissible. Under the rule as laid down by the Supreme Court of the United States and this court in *Edison v. Board, supra, N. L. R. B. v. Haddock Engineers, Ltd., supra,* and *N. L. R. B. v. Meat Cutters, supra,* such hearsay being uncorroborated by admissible evidence cannot amount to substantial evidence sufficient to sustain a finding of the Board.

The Board argues in its brief that the necessity for the production of the supporting records to the summaries and conclusionary evidence was rendered unnecessary by the ruling of the Trial Examiner that respondent could have access to these records at the respective plants of the customer and if respondent found any errors or was not permitted inspection, that upon a proper motion he would strike such evidence. But the fallacy of that position lies in the fact that it is not according to the law as pronounced by this court and others. The position overlooks the fact that by this procedure respondent is foreclosed from it right to cross-examine the witnesses as to the documents and amounts. No provision was made by the Trial Examiner to permit cross-examination after inspection. In the instances where the witnesses had documents in court, the Trial Examiner did not permit inspection but set up the rule that the witnesses could return to their plants with the documents and permit inspection there. But inspection at their plants would not afford respondent any right of cross-examination.

The Trial Examiner said he took this position that under the provisions of the Taft-Hartley Act, which states:

> "Any such proceeding shall, *so far as practicable*, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1943—(U. S. C. title 28, 723-B, 723-C)." (Emphasis supplied.)

Under this he ruled that it would be "impracticable" to require these witnesses to bring in the supporting books and records for inspection and cross-examination, but that inspection would be afforded at the respective plants of the companies and he put upon respondent the burden of visiting these twenty-five plants, located throughout Los Angeles and Orange counties and requiring travel of approximately 200 miles, and then if errors were detected to bring them to his attention by motion and he would strike the evidence. The Trial Examiner did not point out why it would be more "practicable" to require respondent to assume such a burden, and as we have indicated he made no provision for cross-examination in any event. We submit, that the Trial Examiner had no legal authority to make such a ruling and by denying the right of cross-examination to respondent denied respondent a fair hearing and due process of law. The Trial Examiner obviously was treating the convenience of the witnesses over that of respondent. But the word "practicable" does not mean practicable to the parties.

> *Associated Press v. Emmett,* 45 Fed. Supp. 907, 911 (D. C. Cal.);
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> *Freedman v Stallings,* 128 Fed. Supp. 179, 181 (D. C. N. C.);

In re Kenilworth Bldg. Corp., 105 F. 2d 673, 676 (C. A. 7);

In re Philadelphia & Reading Coal and Iron Co., 104 F. 2d 126, 127 (C. A. 3).

We submit that in another respect the Trial Examiner denied due process and arbitrarily resolved an issue against respondent.

During the hearing, Richard Smith testified as indicated above. The stenographic transcript of his testimony revealed that he had testified to the amount of his company's exports in commerce to be $32,415.68. [Steno. Tr. p 293.] The Trial Examiner upon his own motion issued an order to show cause why this figure should not be corrected to accord with the notes he had taken during the hearing. In response the General Counsel, without consultation with respondent obtained an affidavit from Smith [R. 8-9] and without serving a copy on respondent filed this affidavit with the Trial Examiner who then without further consultation, as to the filing of the document or the failure to have it served on respondent, found that his note was right and in his Intermediate Report ordered the transcript to be corrected to show the figure $324,015.68 to which procedure and finding respondent duly excepted. At no time prior to the receipt of the Trial Examiner's Intermediate Report did respondent have any knowledge that the General Counsel had filed an affidavit of Smith and it was not until the printed record of these proceedings was given to respondent did it have access to the affidavit or the contents thereof.

The Board argues that this procedure is approved by the Board's rules and regulations which require the Trial Examiner to see that the facts are clearly and fully

developed. But of course this has reference to the Trial Examiner's conduct at the time of the hearing and not *ex parte* action on his part to supplement the record. The Board also raises the question that respondent failed to challenge the accuracy of the affidavit. Of course this was impossible because respondent had no access to the affidavit or its contents. The affidavit, not subject to cross-examination was given full credence by the Trial Examiner without knowledge being imparted to respondent of his doing so, at least before his comments appeared in the Intermediate Report. That this conduct was highly prejudicial to respondent is indicated by the fact that had not this questionable and unwarranted action been taken by the Trial Examiner the sum of $30,028.40 would have been removed from the sum of the purchases and thus *rendered that sum less than the requisite $200,000.00.* Aside from this improper conduct of the Trial Examiner the purported affidavit of Smith does not sustain the conclusions of the Trial Examiner because Smith, in his affidavit states that he has no recollection of the exact amount to which he testified at the hearing [R. 8-9], that since being asked to make the affidavit he had consulted "the summary" to which he referred in his testimony and find that the figure there is $324,015.68. [R. 9.] The Trial Examiner, without affording respondent knowledge of this affidavit, or providing for cross-examination admits an exhibit which he had previously excluded on the objection of respondent. From this he concludes that the stenographic transcript is wrong and orders it corrected to confirm to his notes and the conclusionary statements of Smith's affidavit. [R. 13-15.]

We submit that this was highly improper and denied to respondent the due process of law required and hence his

correction of the record was unwarranted and the conclusions reached by him and approved by the Board, in this respect, are void.

The proceeding further fails to comply with the requisites of due process in that the complaint was not signed by the Regional Director as the rules and regulations of the Board require. The signature of the Regional Director was placed there by a person other than that officer without any order of the Board having been issued authorizing the same. Under the Board rules, the "Regional Director means the agent designated by the Board as regional director for a particular region." (Rules and Regs., series 6 as amended, p. 1.) Under the rules only the Regional Director designated by the Board has authority to issue and signed complaints. (Bd. Rules and Regs, *supra,* Sec. 102.15, p. 4.) Consequently any agent not designated by the Board as regional director has no authority to issue or sign a complaint even though that person signs the name of the designated regional director. For this reason the complaint issued in this matter was invalid and all proceedings thereunder are a nullity.

It is submitted that the Board's jurisdictional conclusions are not supported by substantial evidence and that respondent has been denied the requisite due process of law and the case should be dismissed in its entirety.[9]

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[9]Petitioner relies on *N. L. R. B. v. Stoller,* 207 F. 2d 305, 307, as being authority for the proposition that it is for the Board not the court to determine whether jurisdiction should be exercised. The court, however, in that case emphasized, that in any event the Board's finding with respect to jurisdiction must be supported by substantial evidence on the record considered as a whole. Here, the Board restricted its exercise of jurisdiction to a limited set of circumstances. The case was heard and the Board decided jurisdiction on the basis that customers of Jones who were themselves

II.

There Is No Substantial Evidence to Support a Conclusion That Respondent Union Has Committed Unfair Labor Practices as Alleged.

On the merits, the complaint alleged and the Board found that respondent union had caused the employer, W. B. Jones Lumber Company to discharge Donald Tooze in violation of Section 8(b)(2) of the National Labor Relations Act, and that respondent union had refused to give a clearance to Tooze because he was not a member in good standing with respondent union.

The evidence in this regard was that a John Matzko demanded the discharge of Tooze under a threat of picketing and that the employer acceded to the demand and effect the termination of Mr. Tooze.

Tooze at the time, had been suspended from membership by a sister local of respondent union for an infraction of the constitution and by-laws of respondent's International Union. Tooze was duly tried, was found guilty and declined to appeal his conviction as provided in that constitution. After his trial, he ceased paying his dues into the union.

When Tooze arrived in Los Angeles in July or August of 1954, he was in arrears in his dues payments for five or six months.

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engaged in commerce had purchased $200,000 of materials from Jones. A failure to show, by substantial evidence both of these contingencies, by the Board's own standards creates a condition over which the Board has publicly stated it would not take jurisdiction. Petitioner's argument based on the *Stoller* has no application, because the court is concerned only as to whether the findings were supported by substantial evidence not what the Board might have held had the theory and proof been otherwise.

After he was discharged, he made an abortive attempt to proffer dues payments, not to the local union to which he owed the dues but to respondent union which had no authority to receive them. Tooze admittedly was being counseled by a rival union whose competition was detrimental to the welfare of the Carpenters' union. In furtherance of these attempts to undermine respondent and to upset the disciplinary action taken against him, he arranged a series of events which were made to appear that his discharge was caused by the respondent, when in fact his own conduct was the reason of his termination, as for example his attempt to pay his back dues to a local which had no authority to receive them. He knew that in so doing he was acting improperly in an effort to escape the result of his wrong doings in the sister local.

In reaching its decision that respondent union had violated the act, the Trial Examiner and the Board utilized evidence admitted solely against the company and which the trial examiner ruled would not be taken as against the respondent union [R. 112, 113, 114, 133-138, 150-151, 152], to find that respondent union had committed the unfair labor practice alleged.[10]

We submit that fairly considered the Board's evidence does not meet the standards of proof to sustain the conclusion that respondent union had committed the unfair labor practices as alleged and found.

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[10]While the Jones Company was a respondent below and the Board issued its order against the company as well as respondent union, and filed the instant petition against the company as well as the union, the Board in its brief before this court withdraws its request for enforcement of the order against the company because the company is willing to comply with the order. This however, does not excuse the use of evidence admitted solely against the company to be used against respondent union and the basic findings of violation supported by such evidence must fail for want of substantiality and as an infringement on due process.

Conclusion.

For the reasons heretofore advanced it follows that the petition for enforcement of the Board's order must be denied and an order entered setting aside the Board's Decision and Order in full.

Respectfully submitted,

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